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IN THE

Supreme Court of the United States

October Term, 1958.

No. 650.

ARNOLD HANKINSON,

Petitioner,

v.

HON. FRANCIS L. VAN DUSEN

and

HON. C. WILLIAM KRAFT, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED.

Did the Court of Appeals abuse its discretion in denying a petition for mandamus and prohibition by which the plaintiff in a personal injury case sought review of an interlocutory order appointing impartial medical experts to examine the plaintiff pursuant to a local rule of the District Court?

STATUTE AND RULE INVOLVED.

The case involves the discretionary power of the Court of Appeals under the All Writs Act, Section 1651(a) of the Judicial Code, 62 Stat. 944 (1948), as amended, 63 Stat. 102 (1949), 28 U. S. C. § 1651(a) (1952), which provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The petition for mandamus and prohibition which was denied by the Court of Appeals sought to question preliminarily the validity of a local rule of the United States District Court for the Eastern District of Pennsylvania, adopted June 2, 1958, the text of which appears at page 7 of the petition for certiorari.

STATEMENT OF THE CASE.

The present petitioner filed in the United States Court of Appeals for the Third Circuit a petition for writs of mandamus and prohibition alleging that he was the plaintiff in an action claiming damages for personal injuries consisting, inter alia, of a ruptured intervertebral disc and a traumatic heart attack. Petitioner has conceded that the opinions of the respective doctors retained by the parties to the action are "diametrically opposed" to each other as to the existence of medical conditions and as to the causal connection between certain admitted conditions and the accident (Motion for Impartial Medical Examination ¶¶ 4-8, and Transcript of Hearing, Oct. 7, 1958, pp. 4-5; also Petition for Mandamus ¶ 2).

The petition for mandamus further alleged that on motion of the defendant, the Pennsylvania Railroad Com-

pany, joined in by the United States as third-party defendant, the respondents, District Judges Van Dusen and Kraft, had entered an order appointing two impartial medical experts to examine plaintiff, one with respect to his alleged ruptured disc and the other with respect to his alleged traumatic heart attack (Petition for Mandamus, ¶¶ 5, 7; Order of Oct. 9, 1958 ¶¶ 2, 3). The order, in its preamble, contained a finding (made after a full hearing, the transcript of which is part of the record certified here) that "such examinations and reports thereon would be of material aid to the just determination of the case".

The order was entered pursuant to a local rule of the District Court, adopted June 2, 1958, authorizing any judge of the Court in a personal injury case to appoint an impartial medical expert or experts chosen from a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with the Court and with a Committee appointed by the President of the Pennsylvania Bar Association.[1] The rule provides that the compensation of the experts so appointed shall be paid equally by each party to the litigation unless the judge, in his discretion, orders payment to be made otherwise in order to meet special

1. The Medical Society of the State of Pennsylvania has requested that the composition of the panel not be made public because the Society felt that to do so would engender misunderstandings among members of the medical profession over the noninclusion of particular doctors in a panel which must necessarily be kept within reasonable limits. In practice, the District Court submits to the parties the name of the doctor selected and ascertains whether there is any objection to him. In the case at bar, one of the doctors initially selected by respondents was objected to by petitioner on the ground that he had done work in the past for certain defendants, and the next doctor in the panel was accordingly selected. The Court then afforded the parties additional opportunity, after investigation, to make any objection they might find to either of the doctors who had been tentatively selected. No objection was made (Transcript of Hearing, Oct. 7, 1958, pp. 9-11, 13).

factual situations. Under the rule, either party, or the trial judge, may call the examining physician or physicians to testify at the trial.

The order here involved contained an additional finding that plaintiff could not presently afford to pay one-half of the fees of the impartial medical experts and accordingly provided (¶¶ 6, 7) that the defendant should pay the total fees subject to reimbursement of fifty percent thereof by plaintiff out of any recovery by him in the action. The order directed that a stipulation providing for such reimbursement be filed by the parties before distribution to counsel of the reports of the impartial experts.

The petition for mandamus and prohibition alleged that both the order and the District Court's rule on which it was based are unlawful and unconstitutional on the grounds: (1) that if the findings of the impartial experts were introduced into evidence at the trial the jury would "undoubtedly" give "undue weight" to them and that this would result in denial of petitioner's right to trial by jury; (2) that the requirement that petitioner pay his share of the experts' fees out of any recovery in the action deprived him of property without due process of law; and (3) that the requirement that a stipulation be filed before distribution of the experts' reports to counsel violated Rule 35(b)(1) of the Federal Rules of Civil Procedure (which requires a party causing a physical or mental examination to be made to furnish a copy of a written report of the examination upon request of the party examined).[2]

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2. The petition for certiorari (pp. 9, 11, 26) contains the misleading suggestion that petitioner's counsel, but not defendant's counsel, may be deprived of the impartial experts' reports. Respondents' order of October 9, 1958 is clear, however, in its requirement (¶ 7) that petitioner shall stipulate, to pay his share of the fees out of any recovery, "prior to the distribution to counsel of copies of the aforesaid reports"—*i.e.*, prior to their distribution to counsel for any of the parties. Similarly, distribution to any counsel of copies of the reports may not be made until after the defendant pays into Court the amount of the impartial medical experts' fees (¶ 6).

The petition sought issuance of a writ to the respondent judges requiring them to revoke the local rule of June 2, 1958 and to vacate their order for examination of petitioner by impartial medical experts.

The Court below (Maris, McLaughlin and Hastie, *JJ.*) denied the petition.

ARGUMENT.

Respondents do not doubt the **power** of the Court of Appeals to review on mandamus or prohibition the questions sought to be raised by petitioner. **LaBuy v. Howes Leather Co.**, 352 U. S. 249 (1957), and **Ex parte Peterson**, 253 U. S. 300 (1920), cited by petitioner, do no more than establish the now-settled proposition that such power exists.

What petitioner overlooks completely is that review through the device of a prerogative writ is a **discretionary** matter. As Mr. Chief Justice Stone stated in **Roche v. Evaporated Milk Ass'n**, 319 U. S. 21, 25 (1943), in considering the power of the courts of appeals to issue writs of mandamus and prohibition:

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. * * *"

See also **LaBuy v. Howes Leather Co.**, *supra*, 352 U. S. at 260; **Parr v. United States**, 351 U. S. 513, 520 (1956); **Ex parte Peru**, 318 U. S. 578, 584 (1943); 6 **Moore, Federal Practice** 91 (2d ed. 1955).

The discretionary power is, moreover, a power to be exercised "sparingly", so as not to thwart the firm policy against piecemeal appeals. **Parr v. United States**, *supra*, 351 U. S. at 520. And, as Mr. Justice Jackson so forcefully stated in **Ex parte Fahey**, 332 U. S. 258, 259-260 (1947):

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

In the case at bar, even if it be assumed that there were some merit in petitioner's challenge of the local rule for impartial medical examination or of its application to him, it was clearly within the discretion of the Court of Appeals for the Third Circuit, as the Court having the immediate responsibility for supervision over the District Court of which respondents are members [see **LaBuy v. Howes Leather Co.**, *supra*, 352 U. S. at 259-260], to conclude that petitioner's challenge will be more appropriately presented on appeal from a final judgment in his case if it then appears that he is aggrieved either by the final judgment[3] or by operation of respondents' order requiring him to reimburse the defendant for petitioner's share of the impartial experts' fees.[4]

The scope of the discretion allowed the courts of appeals in denying resort to the peremptory writs is reflected by this

3. One such appeal to the Court of Appeals for the Third Circuit is now pending, from a judgment for the defendant in the case of **Porta v. Pennsylvania R. R.**, Civil Action No. 21,293 (E. D. Pa.; notice of appeal filed January 15, 1959), where an impartial medical expert was appointed and testified at the trial over the objection of the plaintiff. In the case at bar, there are many potentialities under which the appointment of the impartial medical experts will not result in any conceivable prejudice to petitioner—*e.g.*, their reports may be favorable to petitioner; the case may be settled (possibly as a result of the effect of the impartial reports in helping to reconcile the present differences between the parties' respective experts); or, in any event, the impartial experts may not be called to testify at the trial.

4. Insofar as petitioner seeks to challenge any matter concerning payment of the impartial experts' fees, mandamus is clearly inappropriate under this Court's holding in **Ex parte Peterson**, 253 U. S. 300, 319 (1920), that even though an order as to costs was erroneous as a matter of law, such an error did not require remedy by mandamus or prohibition since it could be corrected on appeal from final judgment in the case. (The costs order in **Peterson** was erroneous under the doctrine that no costs may be taxed against the prevailing party in an action at law—a doctrine no longer applicable in the federal courts in view of the express provision in Fed. R. Civ. P. 54(d) that the Court may direct the allowance of costs otherwise than to the prevailing party.)

Court's action in recent years in consistently denying petitions for certiorari seeking review of such denials: **Great Northern Ry. v. Hyde**, 355 U. S. 872 (1957); **James Nasser Productions, Inc. v. Clarke**, 353 U. S. 957 (1957); **In re Narragansett Pier Amusement Corp.**, 350 U. S. 862 (1955);[5] **Fannin v. Jones**, 351 U. S. 938 (1956); **Berkshiser v. Jones**, 351 U. S. 938 (1956); **Vaughan v. Miller**, 349 U. S. 920 (1955); **Radio Corp. v. Igoe**, 348 U. S. 968 (1954).

The foregoing conclusions are not altered by petitioner's strained and disingenuous efforts (most of which are being made for the first time in this Court) to analogize the present situation to cases involving references to a master or the right to jury trial. No such question is here involved. In the final analysis, the District Court of which respondents are members has simply adopted a rule formalizing a procedure under which the Court may exercise its unquestionable right to call its own witness [9 **Wigmore, Evidence** § 2484 (3d ed. 1940)] in the type of case where most thoughtful observers have long recognized the desirability of such a procedure.[6] As Professor Wigmore said (*id.* at 270):

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5. As appears from the opinion of the Court of Appeals in the **Narragansett Pier** case, 224 F. 2d 231 (1st Cir. 1955), that was a case in which parties to antitrust litigation sought mandamus to review the action of a district judge in referring the litigation to a master—a situation substantially similar to that in **LaBuy v. Howes Leather Co.**, *supra*, 352 U. S. 249, where this Court granted certiorari and affirmed a Court of Appeals' grant of mandamus to invalidate such a reference. This Court's refusal to interfere with the denial of mandamus in the similar situation in **Narragansett Pier** demonstrates that the Court will not, except in extraordinary circumstances, interfere with the exercise of the discretion of a Court of Appeals in denying mandamus.

6. See, *e.g.*, **Impartial Medical Testimony** (A Report by a Special Committee of the Association of the Bar of the City of New York) (Macmillan, 1956); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 So. Calif. L. Rev. 195 (1956); Peck, *Impartial Medical Testimony, A Way to Better and Quicker Justice*, 22 F. R. D. 21 (1958).

"The appointment of disinterested *expert witnesses* by the Court is one of the expedients employed for reforming the defects of the partisan system of providing such testimony."

The wide recognition of the clear propriety of such a procedure is implicit in the multitude of statutes and rules, in both England and the United States, providing for court-appointed experts [see 2 **Wigmore, Evidence** § 563 n.7 (3d ed. 1940) for a collection of such provisions] and in the use of impartial medical testimony in other federal district courts without any specific local rule of court. See also Rule 28 of the Federal Rules of Criminal Procedure, confirming the general power of the Court in a criminal case to appoint expert witnesses.

CONCLUSION.

The petition for certiorari should be denied.

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February 16, 1959.